IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

FIRST APPEAL NO.198 OF 2007

Pushpaben Mulji Kothari & ors. .. .. Appellants (Orig.Plffs.)

v/s.

Municipal Corporation of Greater Mumbai & others. .. .. Respondents (Orig.Defts.)

Mr.V.A. Thorat, Senior Advocate with Mr.R.A. Thorat and Mrs.V.V.Thorat for the Appellants.

Mr.J. Reis with Mr.J.J. Xavier for Respondent No.1-BMC.

Mr.P.M. Shah for Respondent No.4.

Mr.N.V. Walawalkar, Senior Advocate with Mr.S.R. Bhalekar for Respondent No.3.

CORAM : ROSHAN DALVI, J.

Dated : 11th June, 2007

ORAL JUDGMENT :

1. A very narrow point of determination arises in this First Appeal. The Appellants (original Plaintiffs) sued the

Respondents (Original Defendants) in the Bombay City Civil Court, challenging the Notice under Section 351 of the Bombay Municipal Corporation Act, issued on 8.6.2001 for construction of ground plus first floor structure of the Appellants.

2. The Appellants replied to the said notice stating that the premises consisted of ground floor with a mezzanine floor and a room above it on the first floor admeasuring 300 sq. feet built up area in the chawl known as Gokuldas Raghavji Chawl. The Appellants relied upon a city survey plan. The city survey plan showed the entire chawl, including the Appellants' structure. All the rooms in the chawl were shown to be ground plus first floors. The Appellants' room was shown to be only a ground floor construction. Only the Appellants' room did not show any existence of the first floor.

3. The DMC considered the Appellants' reply and passed an order on 2.7.2001 stating that it was established that the mezzanine floor and the first floor were unauthorized and not reflected in the city survey plan and directing the

Appellants to remove the notice structure within 15 days. The notice structure is the ground floor as also the first floor premises. The Appellants, therefore, sued challenging the notice and the DMC's order.

4. The 1st Plaintiff claimed in the Suit that she was a tenant of the room on the ground floor and the mezzanine floor therein and a room on the first floor exactly above the said ground floor room. She had a single rent receipt in respect of both the rooms. The averment in Para-5 of the Plaint is, inter alia, that there is a staircase to go to the first floor of the said chawl situated by the side of the suit premises.

5. The 1st Plaintiff claimed to have carried out certain repairs and renovations to the premises tenanted by her. She had mentioned about such repairs through the Affidavit filed by her son, who was a Constituted Attorney in the Small Cause Court Suit. In that Affidavit, permission of the landlady to carry out extension to the existing premises upon receiving consideration is mentioned.

6. In the Suit filed in the City Civil Court itself, the landlady as

well as her son have been examined. The evidence of the son of the landlady viz. Suryakant, who was her Constituted Attorney, showed that in 1993 without the consent of the landlady, the 1st Plaintiff's husband and sons constructed the mezzanine floor inside the premises and also the first floor above the premises. The landlady, who was Defendant No.4 in the Suit, examined herself. She deposed that the suit property was purchased by her in 1952, prior to which the premises tenanted to the husband of the 1st Appellant had a ground floor with mezzanine floor with a height of 17 feet. She further deposed that the 1st Plaintiff's husband carried out repairs by modifying conical roof of the structure and making it straight without any curve in the year 1992-93.

7. Defendant No.3, who is the developer, has examined himself and produced the photographs of the suit structure which are marked D-2 in the evidence. The photographs show a separate ground floor and first floor of a completely different material than the rest of the structure of the chawl

consisting of four other rooms with a first floor.

8. In support of the 1st Appellant's contention that the entire structure has been in existence prior to the datum line and, therefore, is tolerable, she has stated in Para-12 of her examination-in-chief that neither her husband nor she had made any additions or alterations in the suit premises originally let out prior to 1950 to her husband. This must be considered along with the Affidavit filed by her son in the Small Cause Court in which he has mentioned about carrying out extension to the existing premises of himself as well as other tenants.

9. Since the impugned judgment and order has to consider only authorization and existence of the suit construction, which relates to the ground floor as well as the first floor premises and is dependent only upon the documents of the Appellants, and since all the parties have produced copies of the entire record, it has been conceded that the Appeal be disposed of at the admission stage itself.

10. Upon the case of the 1st Appellant that the ground floor as

well as the first floor of her structure is authorized, and upon her challenging the notice as well as the DMC's order, the Suit has been filed. The evidence of the 1st Appellant herself as well as that of the son of the landlady and the landlady are material. The only document, which can throw light upon the existence of the structure, is the city survey plan, which shows the ground floor and not mezzanine or the first floor of the suit structure. In fact, the notice mentions only about the ground and first floors. It has been argued on behalf of the Appellants that there was a mezzanine floor also. The only legal aspect to consider about the mezzanine floor is its height and its entrance. Separate height of the mezzanine floor has not been mentioned in the extensive evidence led by the parties. The Plaint itself mentions about the entrance of the premises with a staircase by the side of the premises. Consequently, it has been seen that the 1st floor of the premises is independent and separate. Hence, the description of the premises being the ground floor and the 1st floor in the impugned notice as well

as in the DMC's order is correct. All that is required to be seen is whether an existence of both ground floor and the first floor is shown by the Appellants. The city survey plan does show the existence of the ground floor prior to the datum line. The city survey does not show the existence of first floor prior to the datum line.

11. After considering the entire oral and documentary evidence of the parties, the learned Judge came to the correct conclusion that the ground floor being authorized as being in existence prior to the datum line deserves to be protected against demolishing by virtue of its mention in the impugned notice as well as upon the DMC's order calling upon the Plaintiffs to remove the structure under the notice. The learned Judge has, therefore, protected that portion of the Appellants' structure by the order of injunction and partly decreed the Plaintiffs' Suit.

12. The Plaintiffs not having proved the existence of the first floor as having been constructed along with ground floor and after considering oral evidence of the parties showing even

earlier litigation where the son of the 1st Plaintiff filed an Affidavit stating that the landlady allowed horizontal as well as vertical extensions to the structure of all the tenants and upon considering the further oral evidence relating to the permission, if any, granted by the landlady in the year 1992-93, the learned Judge correctly came to the conclusion that the construction of the first floor was unauthorized. Hence, the Suit has not been fully decreed. Upon part decree, it follows that the first floor premises of the Plaintiffs is not protected by the order of injunction in the Suit. Hence, this Appeal.

13. It is contended on behalf of the Appellants by Mr.V.A. Thorat, that once even part of the structure is authorized, the entire impugned notice is required to be struck down. He further contends that the notice cannot survive since at-least the ground floor structure of the Appellants' is seen to be authorized and protected by the order of the Trial Judge

in the impugned judgment. That contention is incorrect. The Court can mould the relief in respect of any part of the structure and can consider the validity of a part of an order or notice which has been challenged in the Suit. The judgment and order of the Court is required to be on merits of the claim of the Plaintiff. If the Plaintiff succeeds in proving a part of the claim, the Plaintiff is entitled to have his or her Suit partly decreed. (This is more so, if the impugned action is severable as in this case.) If the Plaintiff succeeds in proving the entire claim, the entire Suit would be required to be decreed.

14. In the case of **Jose D'Costa vs. Bascora reported in AIR 1976 SC 1825**, the suit, which was for possession of land and a house, was partly decreed. In that case the Plaintiffs claimed possession of a house in possession of the Defendants for 40 years and a portion of the land on which they constructed their own house. The Defendants were found to have acquired title by prescription to the house in

which they lived. The Plaintiffs had constructed another house on another portion of their land. The suit was dismissed for the portion held to be in continuous possession of the Defendants, hostile to the Plaintiffs, and decreed for declaration of title in respect of the remaining portion of the land. Hence, though the Plaintiffs claimed declaration and possession of the entire property, the suit was decreed only for a part thereof, of which the Plaintiffs proved their claim.

15. Similarly in the case of **Babasaheb Rahimsaheb vs. Rajaram Ragnhunath Alpe** reported **in AIR 1931 Bombay 264**, in a wrestling Agreement having separate clauses, it was held that because one clause is void, it would not cause other clauses to fail. In this case, the Plaintiffs claimed that both the ground and first floors were authorised and hence, claimed the reliefs of declaration and protection of their possession. The reliefs could be granted for the ground floor premises which the Plaintiffs proved to be authorised, but could not be granted for the first floor premises which the

Plaintiffs could not prove to be authorised. Upon proof of a part of the suit structure as authorized, the entire notice, therefore, cannot be struck down, just as upon not proving a part of the claim of the Plaintiffs, the entire suit cannot be dismissed. The judgment of the learned Trial Judge is, therefore, correct. No prejudice to the Appellants despite merits of their case is shown. For whatever the Plaintiffs merited, the learned Judge has granted the injunction. Part of the structure, for which no merits were shown, the learned Judge could not have and has not granted any reliefs to the Plaintiffs. The impugned judgment and order is correct. The Appeal is, therefore, dismissed. No order as to costs.

16. Interim order, which has been passed in the Suit, is continued for a period of six weeks.

(ROSHAN DALVI, J.)